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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 204

HAROLD LURIE AND SAMUEL DWORETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Harold Lurie and Samuel Dworett, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgments of the United States District Court for the Northern District of Illinois, Eastern Division, were entered on February 5, 1954, and are not reported but are printed in the record filed on pages 729-739.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgments, was filed

May 2, 1955, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On May 17, 1955, the Court of Appeals entered an order extending to May 27, 1955, the time in which petitioners could file their petition for rehearing. On June 6, 1955, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix.) This petition is filed within 30 days of the denial for the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. May the Wartime Suspension of Limitations Act be relied on to extend the period within which an indictment may be found where *none* of the elements required to invoke that statute is an essential ingredient of the crimes charged?

2. May the Wartime Suspension of Limitations Act be invoked by reason of Clause (2) thereof where none of the elements set forth in Clause (2) is an essential ingredient of the crime charged in the indictment?

3. Where an executive order of the President transfers the functions of the War Assets Corporation to the War Assets Administrator, is not an indictment void which charges that the matters described therein, relative to surplus property, is within the jurisdiction of the War Assets Administration? Should not the indictment, to be valid, have charged that the said matters were within the jurisdiction of the War Assets Administrator?

4. Where the alleged false certificates contained in the

substantive count of the indictment, and named as overt acts in the conspiracy count, are not signed by the respective veterans, and where a motion has been made to dismiss the indictment on the count that it did not state facts sufficient to constitute an offense, may this fatal defect be remedied and supplied by the government's exhibits and the testimony of the respective veterans showing that the certificates were signed?

5. Where the respective certificates, described in the indictment, contained a number of alternative and inconsistent representations: "(3) that the enterprise described herein is one of which more than fifty (50) per cent of the invested capital or net income thereof is owned by, or accrues to, me or other veterans, and that less than 50% of the invested capital or net income is owned by or accrues to non-veterans; or that the property described herein is required as a condition of my employment by others; (4) I hereby certify that the surplus property herein applied for is to be used in and as part of the enterprise described herein; (5) I also certify that the surplus property for resale, if any is applied for, is the initial stock necessary within reasonable limits for the enterprise;" may the defendants be barred from proving a contract with the veterans that 50% of the net income accrued to each respective veteran and that he was paid the said share of net income?

6. It is proper to give an instruction founded upon the "aiding and abetting" statute when the defendant is indicted and tried as a principal and the record is devoid of the elements of proof showing that there was, in fact, a person whom the defendant "aided and abetted"?

7. In the absence of a strict compliance of Rule 30 of the Federal Rules of Criminal Procedure, may not the Court note the giving of inapplicable and prejudicial in-

structions and the denial of a proper instruction tendered by the defendant, as plain error?

8. Does the making of a false statement, within the purview of Title 18, Section 80 U. S. C. include knowledge and intent? May counsel be barred from arguing to the jury that the making of such a false statement includes knowledge and intent; and may the Court refuse a tendered instruction to the effect that the defendants must know that the statements made by the veterans were false?

STATUTES AND RULES INVOLVED.

The pertinent provisions of the Criminal Code involved, of the Federal Rules of Criminal Procedure and of executive orders are:

Section 80, Title 18, U. S. C.
Section 88, Title 18, U. S. C.
Section 3282, Title 18, U. S. C.
Section 3287, Title 18, U. S. C.
Section 2(a) Title 18, U. S. C.
Federal Rules of Criminal Procedures, Rule 30.
Federal Rules of Criminal Procedures, Rule 52(b).
Executive Order No. 9689; 11 Fed. Reg. 1265, 1267.
Executive Order No. 9707, 11 Fed. Reg. 3149.
Reorganization Plan No. 1 of 1947, U. S. C. Congr. Service.

STATEMENT OF THE CASE.

Petitioners were convicted after a trial by jury of conspiracy to defraud the United States of certain governmental rights and functions to administer the sale of surplus property under the Surplus Property Act of 1944, in violation of Section 88, Title 18 U. S. Code. They were also convicted on seven substantive counts. The first of such counts charged petitioners with filing false certificates with the War Assets Corporation, and the other six counts charged the filing of like certificates with the War Assets Administration, all in violation of Section 80, Title 18 U. S. Code. The indictment against the petitioners was found on December 30, 1952.

In more detail, Count 1 charged that commencing in December, 1945 and continuously to August 1946, at Chicago, Illinois, petitioners Lurie and Dworett conspired to defraud the United States of and concerning its governmental right and function in the orderly liquidation of surplus war assets. In substance, the conspiracy charged that in order to fraudulently and unlawfully procure Veterans' preferences in the purchase of surplus property and thus acquire such surplus property for themselves and for Rel Sales Company, Inc., petitioners advised and caused divers honorably discharged veterans of World War II to make applications for surplus property to the War Assets Corporation and War Assets Administration on Veterans' Application for Surplus Property Form (SWPG-66); and advised and counseled said veterans to falsify divers material statements and entries on said applications. Count 1 further charged that the petitioners conspired to do the things described in the substantive counts 2 to 7.

Each of the substantive counts charged that the petitioners did knowingly cause to be made and used a false certificate, knowing the same to contain fraudulent and fictitious statements, which certificate and accompanying and attached veteran's application were of the tenor and description following, to-wit:

> "I hereby certify (1) that all of the foregoing statements are true to the best of my knowledge and belief; (2) that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of World War II, and was discharged or released therefrom under honorable conditions; (3) that the enterprise described herein is one of which more than fifty (50) per cent of the invested capital or net income thereof is owned by, or accrues to, me or other veterans, and that less than 50% of the invested capital or net income is owned by or accrues to non-veterans; or that the property described herein is required as a condition of my employment by others; (4) I hereby certify that the surplus property herein applied for is to be used in and as part of the enterprise described herein; (5) I also certify that the surplus property for resale, if any is applied for, is the initial stock necessary within reasonable limits for the enterprise; (6) I further certify that I have not heretofore applied for or received any surplus property, under the veterans' preference except at the following Smaller War Plants Corporation or War Assets Corporation's offices: (R. 8).

Then followed a Veteran's Application For Surplus Property. At the conclusion, and as a part of the application, appears another certificate in which it is certified that the veteran is *not* procuring the property listed in the application *for the purpose of resale.* It will be noted that this latter statement is entirely repugnant to the statement in the first certificate in which the veteran certifies that the property applied for is for resale.

There are no "foregoing statements" preceding the first certificate set forth in each count.

In Count 2 the first certificate is signed by Maurice M. Leifer. (R. 9.) The second certificate is unsigned. (R. 11.) In Count 3 the first certificate is unsigned (R. 14), as is the second certificate. (R. 16.) In Count 4 the first certificate is signed by William Bloom (R. 19), but the second certificate is unsigned. (R. 21.) In Count 5 the first certificate is signed by Alfred Podolsky (R. 24); the second certificate is unsigned. (R. 26.) In Count 6 the first certificate is signed by Morris Samuel Dakof (R. 29), and the second certificate is signed by him. (R. 31.) In Count 7 the first certificate is signed by Earl Schultz (R. 34); the second certificate is unsigned. (R. 36.)

In all of the first certificates, immediately following the charging part of the indictment, we find this language: "I hereby certify (1) that all of the foregoing statements are true to the best of my knowledge and belief." In none of the counts, however, are there any "foregoing statements."

Motions were made before trial to dismiss the indictment because it did not state facts sufficient to constitute an offense against the United States. (R. 39, 40.) These motions were overruled. The government introduced a number of witnesses, the veterans named in the several counts and one or two additional veterans. Each of them testified that none of the surplus property applied for by each such respective veteran was for his use but for the use of the Rel Sales Company. They testified that they filled out the applications at the request of one or the other of the petitioners.

The defense of the petitioners was based upon one of the representations in the certificate to the effect that more than 50% of the net income from each veteran's venture

in the surplus property field accrued to him or other veterans. Petitioner, Harold Lurie, attempted to testify from books of the Rel Sales Company kept under his supervision in the ordinary course of business, to the effect that the veterans received 51% of the net profits on the merchandise received through each respective veteran. (R. 567.) Thereupon the Court took over the examination of Mr. Lurie for about four and one-half pages of the transcript. (R. 568-572.) He tried to get Mr. Lurie to testify from his memory as to how many purchases and sales were made by the Rel Sales, but the witness could not answer accurately without referring to the books. (R. 560-571.) The Court concluded that the witness wasn't a qualified accountant to prepare compilations from books. (R. 573.)

The total amount of the business done by the Rel Sales Company in 1946 was $3,000,000.00. (R. 569.) Of the foregoing amount, a little over $537,000.00 were the veterans' sales. (R. 614.) The net profit of the company for the year 1946 was about $60,000.00. (R. 558.) None of these figures was disputed nor was the percentage of net profit in the amount of 2% to 2½% contradicted.

The amounts paid to the various veterans on account of their purchases that were delivered to the Rel Sales Company were: Paule, $500.00 (R. 160); Schultz, $1,250.00 (R. 334); Bloom, $500.00 (R. 412); Zima, $200.00 (R. 502); Balukiewiez, $300.00 (R. 515); Podolsky, $1,000.00 (R. 578); Dakof, $2,400.00 (R. 605); Rostker, $1,000.00 (R. 606); Leifer $5,000.00 (R. 613). The total paid to the veterans was $12,150.00, or approximately one-fifth of the total of the net profits, although their business constituted one-sixth of the total sales of the Rel Sales Company.

The conspiracy count charged that the defendants did, pursuant to a certain profit sharing agreement between them and the veterans, knowingly advise and cause them

to turn over to the defendants the surplus property to which they were entitled under their preferences. (R. 5.)

The Court read this section of the indictment to defense counsel and said: "I suppose you want to show that that profit sharing agreement is not what the veterans said they were." Counsel answered: "That is what our defense is based upon." And the Court ruled "It would not be a defense" (R. 589), adding: "If we ever started that, I think the Government will want to examine them, and call them back." (R. 590.)

The Court gave an instruction to the effect that if either of the defendants committed the offenses charged or that he aided or abetted other persons so doing, that the jury should find the defendant guilty, but if the jury believed from the evidence that either petitioner did not commit the offense nor that they aided or abetted others, then the jury should find him not guilty. (R. 707, R. 708.)

Petitioners' counsel stated to the jury, during final arguments, that the petitioners must have knowledge and must have intent in the making of a false statement. An objection to this argument of counsel was sustained. (R. 688.)

The following instruction was requested by the petitioners but refused:

> "The Court instructs the jury that before you can find the defendants guilty of causing the false statements alleged in Counts 2 through 7, you must find the defendants knew what representations were made by the veterans at the time their applications were filed, and that the defendants knew those statements to be false." (R. 671.)

Petitioners filed motions to dismiss the indictment challenging its sufficiency, and also urging that the indictment was barred by the three year statute of limitations, Section 3282, Title 18 U. S. Code. Petitioners insist that the

last date upon which an indictment could be returned on the conspiracy count was June 1, 1949, and on the substantive counts, May 8, 1949. However, the government contends that the statute of limitations did not commence to run until three years after December 31, 1949, because it was suspended by the operation of the Wartime Suspension of Limitations Act, Section 3287, Title 18 U. S. Code.

REASONS FOR GRANTING THE WRIT.

I.

The instant cause is one which merits review on certiorari. Three aspects of this case are deserving of the Court's attention. First, there is here involved a vital question pertaining to the construction of an important federal statute, the Wartime Suspension of Limitations Act. Secondly, this case presents a situation where the decision of the lower courts conflicts with applicable decisions of this Court. Thirdly, fundamental issues relating to the administration of criminal justice are involved.

It appears that, in the judgment of the lower court, the earlier decisions of this Court relating to the applicability and operation of the Wartime Suspension of Limitations Act have left a considerable area of uncertainty and doubt. At several points in its opinion the Court of Appeals candidly admitted its uncertainty.

At page 3 of its opinion the Court of Appeals stated:

> "Our task in resolving this issue is made difficult because the Supreme Court has been so closely divided in a number of pertinent decisions and because there is no decision of that Court on the precise point which we here have under consideration."

After reviewing the pertinent Supreme Court cases decided prior to *United States* v. *Grainger*, the Court of Appeals stated, at page 4 of its opinion:

> "The probable holding of the Supreme Court on the

question before us is further obscured by *United States* v. *Klinger, et al.*, 199 F. 2d 645, affirmed by an equally divided Court, 345 U. S. 979. Furthermore, the three dissenting judges in *Grainger* base their dissent upon approval of the reasoning of Judge L. Hand in the *Klinger* case."

We must agree with the lower court that the Suspension Act urgently needs clarification. It is respectfully submitted, however, that had the lower court followed the applicable decisions of this Court, it would have served the cause of such clarification.

We shall show that the Court of Appeals has disregarded the well-established "essential ingredient" rule in determining the applicability of the Suspension Act. Further, we shall show that the lower court erroneously failed to follow controlling precedent, *United States* v. *Klinger,* 345 U. S. 797, affirming 199 F. 2d 645.

1. The Court of Appeals Failed to Follow the "Essential Ingredient" Rule.

The principle that statutes suspending or modifying the operation of what may be termed "ordinary" or "usual" statutes of limitations will be strictly construed is long established and well settled. *Bridges* v. *United States,* 346 U. S. 209, 215, 216; *United States* v. *McElvain,* 272 U. S. 633, 639; *United States* v. *Scharton,* 285 U. S. 518, 521, 522. In pursuance of this principle the Court has consistently held that a suspension statute may not be invoked unless the element upon which the invocation is based is itself an *essential ingredient* of the crime charged. *Bridges* v. *United States,* 346 U. S. 209, 223; *United States* v. *Noveck,* 271 U. S. 201, 203; *United States* v. *Scharton,* 285 U. S. 518, 522; *United States* v. *Gilliland,* 312 U. S. 86, 93.

The determination as to whether a given element is an essential ingredient of a crime is made by reference to the

statutory definition of the crime. As the Court said in *Bridges* v. *United States* (*supra*), at page 223:

> "It is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act."

In the instant cause, the substantive offenses are defined in Section 1001, Title 18 of the United States Code, 62 Stat. 749, as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

This statute was formerly part of Section 80 of Title 18, United States Code, and was commonly known as the false statement clause of the False Claims Act.

This statute was formerly Section 88 of Title 18, United States Code.

The Wartime Suspension of Limitations Act, Section 3287, Title 18, United States Code (Supp. V), provides as follows:

> "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancella-

> tion, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

In the instant cause, only two of the elements warranting invocation of the Suspension Act are in any way pertinent. Clause 3 of the Act has no relevance.

With respect to the first element, fraud, the Court of Appeals correctly classified the instant prosecution as an action "under the false statement clause rather than the false claims clause of the False Claims Act." In such an action, the lower court pointed out, fraud of a pecuniary nature or of a nature involving property is not an essential ingredient of the offense charged and consequently it declined to rely on Clause 1 of the Suspension Act.

With respect to the second element, connection with the acquisition, care, handling, etc., of government property, the court erred. For despite the fact that the "acquisition, care, handling, custody, control or disposition" of Government property is not an essential ingredient of the offense of conspiring to knowingly and willfully cause a false statement to be made to an agency of the United States, or of the substantive offense of making or causing to be made a false statement in any matter within the jurisdiction of any department or agency of the United States, the Court of Appeals proceeded to base its invocation of the Suspension Act on Clause 2.

No connection with property is essentially involved in the instant indictment. The crime alleged was complete when the alleged false statement was filed.

To hold that Clause (2) of the Suspension Act encompasses a violation of Section 88 of Title 18, the offense

charged in Count I of the indictment, and violations of Section 80 of Title 18, the offenses charged in all of the substantive counts of the indictment, is to broaden the scope of Clause (2) of the Suspension Act beyond the boundaries of application set by the Supreme Court in the *Bridges, Noveck, McElvain, Scharton* and *Gilliland* cases for Clause (1) of the Suspension Act. The absence of the "acquisition, etc.", element from the offense of conspiracy in violation of Section 88 and from the offense of making or causing to be made a false statement in violation of Section 80 is certainly as plain as is the absence of fraud as an essential ingredient of the crimes of perjury in the *Noveck* case, conspiracy to defraud by making a false income tax return in the *Gilliland* case, or falsely understating taxable income in the *Scharton* case.

It is patent that Clause (2) is applicable only to specific violations of the Contract Settlement Act of 1944 or of the Surplus Property Act of 1944, as amended, and kindred statutes, all enacted for the purpose of effectuating the "acquisition, care, handling, custody control or disposition of any real or personal property of the United States."

It is not logical or consistent to hold that fraud is not an essential ingredient of the offenses involved in those cases and at the same time to hold that violations of specific statutes, viz., 80 and 88 of Title 18, U. S. C. A., enacted without any specific aim at the "acquisition, care, * * * of real or personal property of the United States," contain as an element of such offenses that they were committed in connection with the "acquisition, care * * * of * * * property of the United States."

The lower court has clearly disregarded the cited decisions of this Court establishing the "essential ingredient" rule, and has thereby erroneously held the Wartime Suspension of Limitations Act applicable to the instant prosecution.

2. The Court of Appeals Failed to Follow the Klinger Case.

United States v. *Klinger* (*supra*), squarely held that a false statement prosecution for acts committed prior to December 31, 1946, could not be commenced after December 31, 1949. It is respectfully submitted that the instant cause is on all fours with the *Klinger* case, and should be governed by the decision in that case. The acts upon which the indictment is based occurred prior to December 31, 1946. Clearly the *Klinger* case is *stare decisis* and should have been followed by the Court of Appeals.

II.

The Government introduced its Exhibits 50A, 51A, 52A, 53A, and 54A, which were the applications of various veterans for surplus property. In these applications the signed certificates appeared at the end thereof, and did not precede the said respective applications, as the same appeared in the respective counts of the indictment. Whether this error, in reproducing the applications and signed certificates in the indictment, occurred through accident or mistake, is of no importance. The fact remains that Counts 2 through 7 of the indictment were fatally defective.

None of these exhibits, nor the testimony of the respective veterans, were before the District Court at the time the motion to dismiss the indictment for insufficiency and failure to charge a crime was made and argued. The Court of Appeals, however, held that the foregoing exhibits, together with the testimony of certain veterans, corrected the invalidity of the substantive crimes, and thereby held that a void indictment may be corrected by exhibits and testimony. The effect of such a ruling is to hold that the Trial Court may amend a void indictment.

The result flowing from the opinion of the Court of Appeals on the foregoing subject may lead to a further complete alteration of procedure; on the basis of that opinion, whenever a defendant files a Motion to Dismiss an indictment on the ground that it is void, the Trial Court may postpone the ruling on said motion for the purpose of taking evidence to determine whether the evidence can correct the fatal defect in the indictment.

The ruling of the Court of Appeals on the foregoing point is in direct conflict with the opinion of the United States Supreme Court in the case of *In re Bain*, 121 U. S. 1, in which case the Court held that no change can be made in the body of an indictment by order of the Court. In the *Bain* case the Trial Court struck out surplus words, and the Supreme Court held that the indictment as thus changed is no longer the indictment of the grand jury which presented it; and that upon an indictment so changed the Court can proceed no further and that a trial on such indictment is void since there is nothing to try.

The Court of Appeals, by the effect of its opinion, has inserted words in the indictment which did not appear therein, and has, by such direction, amended the indictment.

The Court of Appeals has stated that the petitioners were in no way misled by what they contend is a fatal defect in the indictment; but since the indictment is void, the question as to whether they were misled or not is of no material importance. A constitutional question presents itself, as pointed out in the *Bain* case. A void indictment runs contrary to the Fifth Amendment of the Constitution of the United States stating that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." The Supreme Court of the United States in the *Bain* case held that this declaration is jurisdictional.

III.

The conspiracy and the six substantive counts of the indictment charged that the liquidation of surplus war assets under the authority delegated by Congress to the War Assets Corporation and the War Assets Administration was a matter within the jurisdiction of the War Assets Corporation in Counts 1 and 2, and within the jurisdiction of the War Assets Administration in the remaining counts.

On February 2, 1946, the President of the United States issued Executive Order No. 9689, 11 Fed. Reg. 1265. (The full Executive Order appears in the Appendix.) In this Executive Order the functions of the Surplus Property Administrator and the Surplus Property Administration were transferred to the Board of Directors of the War Assets Corporation and the War Assets Administration, which was created by the order. The functions of the Surplus Property Administrator and the Surplus Property Administration relating to surplus property located outside the continental United States was transferred to the Secretary of State and the Department of State, respectively. Effective March 25, 1946, a War Assets Administration was established headed by a War Assets Administrator. The functions of the War Assets Corporation relative to surplus property was transferred to the War Assets Administrator.

In holding that it was proper to charge in the indictment that the matters with relation to surplus property described in the indictment was within the jurisdiction of the War Assets Administration, rather than within the jurisdiction of the War Assets Administrator, the Court of Appeals for the Seventh Circuit ignored and failed to follow the holding of the Supreme Court of the United States in the case of *Fleisher* v. *United States,* 302 U. S. 218, 219, 82

L. Ed. 208, 209, 58 S. Ct. 148. In this case the Supreme Court held that the first count of the indictment failed to state an offense because it charged that the defendant possessed a still without having the same registered with the Collector of Internal Revenue, when the charge should have been that there was a failure to register the still with the District Supervisor of the Alcoholic Tax Unit in the Bureau of Internal Revenue. The holding of the Court of Appeals for the Seventh Circuit is similarly in conflict with the decision of the Court of Appeals for the Fourth Circuit in the case of *Benton* v. *United States,* 80 F. 2d 162, 163.

In the case cited by the Court of Appeals, *Todorow* v. *United States,* 173 F. 2d 439, the foregoing question was not presented or submitted to the Court of Appeals for the Ninth Circuit.

IV.

The trial court gave an instruction to the jury that if the defendants aided and abetted another person in the commission of the offense charged in any count of the indictment, that in such event the jury should find such defendant guilty; if, however, the jurors believe that neither of the defendants did not aid or abet another person in so doing, then the jury should find such defendant not guilty.

The petitioners were not charged with "making a false certificate." Substantive counts charged that the petitioners did "cause to be made and used a false certificate."

In the giving of this instruction, the Court of Appeals for the Seventh Circuit is in conflict with its own decision of *United States* v. *Horton,* 182 F. 2d 427, 430.

This court should exercise its supervisory powers to correct this prejudicial error, since the Court of Appeals merely noted that no objection was made under Rule 30 of the Federal Rules of Criminal Procedure.

V.

In the closing arguments of petitioners' counsel, he argued that the petitioners must have knowledge and intent with respect to the making of a false statement. An objection was sustained to such argument. (R. 688.) Petitioners also asked the trial court to give the following instruction:

> "The Court instructs the jury that before you can find the defendants guilty of causing the false statements alleged in Counts 2 through 7, you must find the defendants knew what representations were made by the veterans at the time their applications were filed, and that the defendants knew those statements to be false." (R. 671.)

The Court of Appeals disposed of this error in the following language:

> "We have considered the other claims of error presented by the defendants. We think a discussion of them is unnecessary and would unduly extend this rather lengthy opinion. Suffice to say we find no prejudicial error in this record."

In approving the trial court's refusal to give the said instruction, the Court of Appeals was in conflict with two decisions of the Court of Appeals for the Ninth Circuit: *Todorow* v. *United States,* 173 F. 2d 439, 447 and *McCoy* v. *United States,* 169 F. 2d 776, 783. In the latter case the Court stated:

> "It is argued that appellant was entitled to a proffered specific instruction upon the proposition that he must know what representations were made by Browning and know them to be false before he could be convicted. Of course, knowledge and intent are essential elements of the crime, and the court gave ample instructions on this subject. Throughout the instructions there are repeated statements to the effect that if the nominal purchaser (Browning) had no intention of buying upon his own account but instead was inten-

tionally using his veteran right for the benefit of McCoy, and that McCoy knew this and schemed, aided and abetted it, that McCoy was guilty as a principal of violating the law."

This Court should resolve the conflicting decisions of the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Ninth Circuit.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 11090. October Term, 1954, April Session, 1955.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* HAROLD LURIE and SAMUEL DWORETT, *Defendants-Appellants.* } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 2, 1955.

Before DUFFY, *Chief Judge,* and FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

DUFFY, *Chief Judge.* Defendants were convicted after a trial by jury of conspiracy to defraud the United States of certain governmental rights and functions to administer the sale of surplus property under the Surplus Property Act of 1944, in violation of §88, Title 18 U. S. Code. They were also convicted on seven substantive counts. The first of such counts charged defendants with filing false certificates with the War Assets Corporation, and the other six counts charged the filing of like certificates with the War Assets Administration, all in violation of §80, Title

18 U. S. Code. The indictment against the defendants was found on December 30, 1952.

In more detail, Count 1 charged that commencing in December, 1945 and continuously to August, 1946, at Chicago, Illinois, defendants Lurie and Dworett conspired to defraud the United States of and concerning its governmental right and function in the orderly liquidation of surplus war assets. In substance, the conspiracy charged that in order to fraudulently and unlawfully procure Veterans' preferences in the purchase of surplus property and thus acquire such surplus property for themselves and for Rel Sales Company, Inc., defendants advised and caused divers honorably discharged veterans of World War II to make applications for surplus property to the War Assets Corporation and War Assets Administration on Veterans' Application for Surplus Property Form (SWPG-66); and advised and counseled said veterans to falsify divers material statements and entries on said applications.

Counts 2 to 7 were similar in form charging defendants knowingly and wilfully caused to be made and used a false certificate knowing the same to contain fraudulent and fictious statements and entries. Each certificate purported to be executed by and upon behalf of a different veteran.

Defendants filed motions to dismiss the indictment challenging its sufficiency, and also urging that the indictment was barred by the three year statute of limitations, §3282, Title 18 U. S. Code. Defendants insist that the last date upon which an indictment could be returned on the conspiracy count was June 1, 1949, and on the substantive counts, May 8, 1949. However, the government contends that the statute of limitations did not commence to run until three years after December 31, 1949, because it was

suspended by the operation of the Wartime Suspension of Limitations Act, §3287, Title 18 U. S. Code.

The pertinent part of the last named statute reads: "When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) * * *, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." Hostilities of World War II were declared terminated December 31, 1946 by Presidential proclamation, 12 Fed. Reg. 1.

In 1945 and 1946, §80, Title 28 U. S. Code contained both the False Claims Act and the False Statement Act. As a result of the 1948 codification of Title 18, the False Claims Act is now contained in §287, and the False Statement Act in § 1001 of Title 18, U. S. Code (1952 Ed.).

The first and most complex question to be decided is the effect of the Wartime Suspension of Limitations Act. If the three year statute of limitations did not commence to run until three years after the termination of hostilities, as contended by the government, the indictment herein found on December 30, 1952 was timely by the scant margin of a day.

Our task in resolving this issue is made difficult because the Supreme Court has been so closely divided in a number of pertinent decisions and because there is no decision of that Court on the precise point which we here have under consideration.

In *United States* v. *Smith*, 342 U. S. 225, a 5 to 4 decision, the Court held the Wartime Suspension of Limita-

tions Act was inapplicable to crimes committed after December 31, 1946, the date when hostilities were declared terminated. In the case at bar the alleged violations were prior to that date. However, in the Court's opinion appear certain dicta which the government claims are favorable to its contentions herein.

In *United States* v. *Grainger,* 346 U. S. 235, a 6 to 3 decision, the Court held the running of the general three year statute of limitations was suspended by the Wartime Suspension of Limitations Act as to violations in 1945 and 1946 of the false claims clause of the False Claims Act. However, the Court emphasized, p. 241: "* * * The offenses charged in Cases No. 634 and No. 635 are violations of the *false claims clause,* as distinguished from the *false statement clause,* of the False Claims Act." The Court said, p. 242: "* * * Our problem is simpler than in the *Bridges* case[1] and in those cases which involve violations of the false statement clause of the False Claims Act."

The government argues that the first part of Count 1 of the indictment herein, the conspiracy count, charges the substantive offense of conspiring to defraud the United States and that such fraud is an essential ingredient of the offense charged. The defendants contend that all of the charges of the indictment come within the false statement clause of the False Claims Act which were specifically distinguished in the *Grainger* decision.

Previous to *Grainger* the Supreme Court held that knowingly making a false material statement pertaining to Communist-party affiliation in a naturalization proceeding, or a conspiracy to defraud the United States by so doing, does not contain fraud as an essential ingredient, *Bridges* v. *United States,* 346 U. S. 209; that false statements to the Civil Service Commission and the F.B.I. in

1. 346 U. S. 209.

seeking federal employment did not contain the necessary pecuniary fraud, *Marzani* v. *United States*, 168 F. 2d 133, affirmed twice without opinion by an equally divided court, 335 U. S. 895, 336 U. S. 922; that defrauding the United States is not an element of the crime of perjury in an income tax return, *United States* v. *Noveck*, 271 U. S. 201; nor a conspiracy to defraud by making a false income tax return, *United States* v. *McElvain*, 272 U. S. 633; nor of attempting to evade taxes by falsely understating taxable income, *United States* v. *Scharton*, 285 U. S. 518.

The probable holding of the Supreme Court on the question before us is further obscured by *United States* v. *Klinger, et al.*, 199 F. 2d 645, affirmed by an equally divided Court, 345 U. S. 979. Furthermore, the three dissenting judges in *Grainger* base their dissent upon approval of the reasoning of Judge L. Hand in the *Klinger* case. In *Klinger* the prosecution was for conspiracy to defraud the United States by impairing, obstructing or defeating the lawful functioning of the office of Price Administration in the rationing of sugar. There was no conspiracy proved after December 31, 1946 and the indictment was found on March 31, 1950. The Court of Appeals stated the issue was not free from doubt. It recognized that its decision was contra to *United States* v. *Showalter*, 103 F. Supp. 806, but held that the prosecution was barred by the statute of limitations.

In the *Showalter* case the charge was a violation of the Servicemen's Dependents Allowance Act of 1942. The last offense charged was in 1945; the information was filed May 7, 1951. It was agreed the prosecution was barred by the three year statute of limitations unless that statute was tolled by the Wartime Suspension of Limitations Act. The question was squarely raised whether the Suspension Act suspended the running of the statute of limitations for a period which commenced three years after the termi-

nation of hostilities. The Court held that it did and that the prosecution was not barred.

We think the offenses charged in the indictment should be classified under the false statement clause rather than the false claims clause of the False Claims Act. The statutory crime charged was that of wilfully and knowingly causing false certificates to be made and used. Fraud is not an element of this crime. The offense is complete when a person wilfully and knowingly causes a false certificate to be made and used. The government need not charge nor prove fraud. Clearly, Counts 2 through 7 are within the false statement clause. We hold that Count 1 is in the same category. We think none of the language used in Count 1, the conspiracy count, justifies a classification of the offense under the false claims clause. There was a somewhat similar charge of conspiracy in *United States* v. *Bridges, supra.* The Court there said, p. 223: "* * * A charge of conspiracy to commit a certain substantive offense is not entitled to a longer statute of limitations than the charge of committing the offense itself. There is no additional time prescribed for indictments for conspiracies as such. The insertion of surplus words in the indictment does not change the nature of the offense charged."

Based upon language used by the Supreme Court in *Grainger,* there is some justification for defendants' argument that the Wartime Suspension of Limitations Act applies only to offenses involving fraud of a pecuniary nature or to offenses of which fraud is an essential ingredient. We must recognize that the Court laid great emphasis in distinguishing the false claims clause from the false statement clause in the False Claims Act. Also, the Court stated its problem in *Grainger* was simpler than in those cases which involved violation of the false statement clause. Nevertheless, neither the Supreme Court nor any Court of Appeals has made any reference to Clause 2

of the Wartime Suspension of Limitations Act. We can think of no reason why it is not applicable. It reads: "When the United States is at war the running of any statute of limitations applicable to any offense * * * (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States * * * shall be suspended until three years after the termination of hostilities * * *." It seems clear that the offenses charged in the indictment herein were in connection with the "* * * custody, control or disposition of any * * * personal property of the United States * * *." Furthermore, this particular clause was added to the Suspension Act by the Surplus Property Act of 1944. Congress was thinking about the disposition of surplus property when it passed the amendment. Thus, there is nothing in either the wording of the statute or in its history, that suggests any reason why it does not apply to the offenses charged in the case at bar. We hold, therefore, that the prosecution was timely and was not barred by the three year statute of limitations.

Defendants assert that the counts of the indictment are void since they charge that as of March 25, 1946 the matters referred to therein were within the jurisdiction of the War Assets Administration when, in fact, they were within the jurisdiction of the War Assets Administrator. Defendants rely upon the following provision in Executive Order No. 9689, issued January 31, 1946 (11 Fed. Reg. 1265), "* * * the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator." However, we think the entire order, together with a letter from the President dated May 1, 1947 which he sent to Congress transmitting Reorganization

Plan No. 1 of 1947, demonstrates that the responsibility for the disposal of surplus property was placed in one agency, the War Assets Administration, headed by a War Assets Administrator. We hold the contentions of defendants in this respect to be without merit. *Todorow et al.*, v. *United States*, 9 Cir., 173 F. 2d 439.

Defendants urge that each of the substantive counts, 2 through 7, is void for vagueness, uncertainty and repugnancy. Each of these counts was based upon a certificate signed by a veteran containing false material statements. The charge was that defendants caused to be made and used a false certificate "* * * which said false certificate and accompanying and attached veteran's application for Surplus Property form SWPC-66 were of the tenor and description following, to-wit:" Then follows a photostatic copy of the certificate together with two pages of the accompanying application. Defendants complain that some of the copies of the certificate were not signed. However, government exhibits 50A, 51A, 52A, 53A and 54A upon which counts 2 through 7 were based, show each certificate was, in fact, signed. The testimony of the respective veterans also showed that they signed the certificates. The defendants were in no way misled. We find no error in this respect.

Defendants complain of an instruction on aiding and abetting, contending that one cannot aid or abet in the commission of a crime unless there was another who has committed the offense,—that one cannot be an aider and abettor of himself. Without going into the merits, it is clear that no objection was made to this instruction pursuant to Rule 30, Federal Rules of Criminal Procedure, after the instructions were given to the jury. At a conference before the jury was instructed the Court informed counsel for each defendant that such an instruction would be given. Counsel for defendant Lurie voiced no objection.

Counsel for Dworett made an objection which was equivocal, to say the least. It did not come close to complying with Rule 30. We hold that under the circumstances of this case the giving of the instruction was not prejudicial error. *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1, 3.

We have considered the other claims of error presented by the defendants. We think a discussion of them is unnecessary and would unduly extend this rather lengthy opinion. Suffice to say, we find no prejudicial error in this record. The judgment of conviction is

AFFIRMED.

JUDGMENT AND ORDERS OF COURT OF APPEALS.

Judgment, entered May 2, 1955, affirming judgments of District Court.

Order, entered May 17, 1955, extending time to file Petition for Rehearing, to May 27, 1955.

Order, entered June 6, 1955, denying Petition for Rehearing.

Certificate of Clerk of Court of Appeals for the Seventh Circuit, dated June 20, 1955.

Statutes Involved.

Title 18 U. S. C. A. § 2: *Principals:*

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

Title 18 U. S. C. A. § 88: *Conspiracy:* (Prior to 1948.)

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Title 18 U. S. C. A. §80 (pertinent part.) *False Statements:* (Now Sec. 1001, (1948).

> "* * * or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate,

affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any manner within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both."

Title 18 U. S. C. A. § 3282. *Limitations:*

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

Title 18 U. S. C. A. § 3287: *Wartime Suspension of Limitations:*

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiations, procurement, award, performance, payment for, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress."

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 30. Instructions:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instructs the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52. Harmless Error and Plain Error:

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

EXECUTIVE ORDERS.

Executive Order No. 9689, 11 Fed. Reg. 1265 (1946).

"Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

"Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated func-

tions relating to the disposal of domestic surplus property;

"Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

"1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, except as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

"2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

"3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator."

Executive Order No. 9707, 11 Fed. Reg. 3149 (1946).

"By virtue of the authority vested in me by the Constitution and Statutes, including Title I of the

First War Powers Act, 1941 (55 Stat. 838), as President of the United States, and as Commander in Chief of the Army and Navy of the United States, it is hereby ordered that section 5 of Executive Order No. 9689 of January 31, 1946, entitled 'Consolidation of Surplus Property Functions' shall be and it is hereby amended, effective as of the date thereof, to read as follows:

" '5. There shall be subject to the Classification Act of 1923, as amended, those positions transferred to the War Assets Corporation hereunder which are now subject to the said Act, and also all positions transferred to the War Assets Administration hereunder; provided that if the salary of the incumbent of any position so transferred to the said Administration is above the maximum of the allocated grade such salary shall not be reduced so long as the position is held by the incumbent; and provided further, that if the salary of the incumbent of any position so transferred to the said Administration is between two salary steps of the grade to which the position is allocated, such salary shall be increased to the higher step. The provisions of section 1 hereof notwithstanding the respective accounting and fiscal procedures in effect with respect to the functions merged shall continue in effect from February 1, 1946 to March 25, 1946. To facilitate the carrying out of the functions herein transferred and consolidated, the Secretary of War and the Secretary of the Navy are authorized to detail on a temporary basis such officers and enlisted persons of the military and naval establishments respectively, as the Chairman of the Board of the War Assets Corporation or the Administrator of the War Assets Administration may certify to be required for military duty therein, in the interest of the national defense and welfare, and any such officer or enlisted person shall, while so detailed, retain and be entitled to the rights, benefits, promotions, and status of an officer or enlisted person of the establishment from which he was detailed.' "

Reorganization Plan No. 1 of 1947, U. S. Code Congr. Service. (Letter from the President to Congress.)

"The present organization for the disposal of surplus property is the product of 2½ years of practical experience. Beginning with the Surplus Property Board in charge of general policy and a group of agencies designated by it to handle the disposal of particular types of property, the responsibility for most of the surplus disposal has gradually been drawn together in one agency—the War Assets Administration—headed by a single Administrator. Experience has demonstrated the desirability of centralized responsibility in administering this most difficult program.

"The reorganization plan will continue the centralization of surplus disposal functions in a single agency headed by an Administrator. This is accomplished by transferring the functions, personnel, property, records, and funds of the War Assets Administration created by Executive order to the statutory Surplus Property Administration. In order to avoid confusion and to maintain the continuity of operations, the name of the Surplus Property Administration is changed to War Assets Administration.

"Because the plan combines in one agency, not only the policy functions now vested by statute in the Surplus Property Administrator, but also the immense disposal operations now concentrated in the temporary War Assets Administration, I have found it necessary to provide in the plan for an Associate War Assets Administrator, also appointed by the President with the approval of the Senate. It is essential that there be an officer who can assist the Administrator in the general management of the agency and who can take over the direction of its operations in case of the absence or disability of the Administrator or of a vacancy in his office."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 204

HAROLD LURIE AND SAMUEL DWORETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 21-29) is reported at 222 F. 2d 11.

JURISDICTION

The judgments of the Court of Appeals were entered on May 2, 1955 (Pet. 30), and a petition for rehearing was denied on June 6, 1955 (Pet. 30). The petition for a writ of certiorari was filed on July 5, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the second clause of the Wartime Suspension of Limitations Act, which suspends the running of the 3-year limitation period as to offenses "committed in connection with the * * * disposition of any * * * personal property of the United States", saved for prosecution crimes in 1946 involving the filing of false veteran's applications to obtain priority in sales of surplus government property.

2. Whether the indictment was sufficient to state an offense.

3. Whether the trial court erred in the charge to the jury.

STATUTES INVOLVED

18 U. S. C. 3287 provides:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination

> inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress. * * *

Section 35(A) of the Criminal Code (18 U. S. C. (1946 ed.) 80) provided in pertinent part:

> * * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On December 30, 1952, a seven-count indictment was returned against petitioners (R. 3-38). The first count charged them with conspiring between December 1945 and August 1946 to defraud the United States of its governmental right and functions in the orderly liquidation of surplus war assets under the authority delegated to the War Assets Administration, and to defraud the United

States of its governmental right to determine, with full knowledge of the true facts, whether to sell certain surplus property in accordance with the objectives of the Surplus Property Act of 1944. Various overt acts were alleged charging a scheme whereby petitioners induced honorably discharged veterans to apply for certifications of eligibility (entitling them to priority in buying government surplus items through the War Assets Administration) on the basis of fraudulent representations that they were engaged in their own business and that the priority articles were to be used in that business, when in fact the applications were false and were executed on behalf of petitioners trading as the Rel Sales Company, who remunerated the veterans and illegally exercised the priority certifications for their own profit (R. 3-8). The other six counts of the indictment charged various substantive crimes of the same character in violation of 18 U. S. C. (1946 ed.) 80, committed between February 19, 1946, and May 7, 1946, at Chicago, Illinois. After a trial by jury, both petitioners were convicted under each count of the indictment.[1] The judgment of the trial court was unanimously affirmed on appeal (Pet. 21-29).

The evidence showed that in 1945 and 1946 peti-

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[1] Each was sentenced to two years' imprisonment on Count 1, and five years on each of the 6 remaining counts, all sentences to run concurrently. In addition, each was fined $10,000 on count 1, and $10,000 on each of the 6 remaining counts with the provision that the payment of $10,000 and costs should discharge the fines and costs on all of the seven counts (R. 729-731).

tioner Dworett was president, and petitioner Lurie the director and general manager of the Rel Sales Company which operated as a wholesale outlet for surplus war commodities, particularly agricultural products (R. 191-192, 558, 569). During this period, the government, through the War Assets Administration and as part of the veterans' benefit program, was selling war surplus items to honorably discharged veterans on a priority basis to be resold at retail by them in connection with their businesses (R. 56-57). To be eligible for priority, the veteran was required to file forms showing that he owned or was going to own over 50 per cent of the enterprise for which the purchase was to be made; that he was financially qualified; and that he was not buying the merchandise for resale to a third party without taking possession (R. 324-326).

A number of government witnesses, who were veterans, testified that petitioners urged them to procure priority certifications; that they did so through misrepresentations as to their business enterprises; that they then sold such certifications to petitioners (R. 147-182, 330-358, 359-392, 429-446, 446-475, 495-519, 519-527). Government witness Leifer, a veteran, was hired by the Rel Sales Company in January, 1946 (R. 184-185). He was told to apply for every conceivable type of merchandise that the War Assets Administration had for sale under the name of a "dummy company" (R. 186-187). Leifer did this, misrepresenting most of the information on the application form (R. 188-189). He testified that petitioners fol-

lowed a regular procedure of buying up surplus priority certificates from veterans who, like himself, received them on the basis of false statements in their applications. Petitioners would then receive allocations of agricultural commodities from the Department of Agriculture, using the priority certificates made out to the individual veterans (R. 207-227, 263).

ARGUMENT

1. Petitioners contend (Pet. 11-15) that the 1946 offenses charged in the indictment, which was returned December 30, 1952, were barred by the statute of limitations. It is the government's position, which was sustained by the courts below, that the indictment was timely under the second clause of the Wartime Suspension of Limitations Act (now 18 U. S. C. 3287), *supra*, pp. 2-3, which suspended, until three years after the suspension of hostilities, the running of the statute of limitations as to offenses "committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States."[2] As to this second clause, it makes

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[2] If the offenses charged come within the purview of the Wartime Suspension of Limitations Act, the indictment was timely filed on December 30, 1952. *United States* v. *Grainger*, 346 U.S. 235, 246-247. Hostilities in World War II were officially declared terminated as of December 31, 1946. The running of statutory limitations was therefore suspended until December 31, 1949. The three-year period of limitations which commenced to run on January 1, 1950, permitted the filing of an indictment at any time up to January 1, 1953. *United States* v. *Grainger*, 346 U.S. 235.

Petitioner's reliance (Pet. 15) on the opinion of the Second

no difference whether or not the offenses involve fraud. That issue is significant only under the first clause suspending offenses "involving fraud" against the United States.[3] Under the second clause, all offenses, whether fraudulent or not, are suspended if they arose "in connection with" property of the United States.

Obviously, both the conspiracy and the six substantive crimes charged were committed "in connection with" the disposal of surplus government property, and therefore come within the literal terms of the second clause. *United States* v. *Epstein*, 119 F. Supp. 946 (E.D. Pa.). That is indicated both on the face of the indictment, and in the evidence adduced on the trial. Petitioners, however, contend that it is not enough that the pleaded or proven facts show that the offense was

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Circuit in *United States* v. *Klinger*, 199 F. 2d 645, affirmed by an evenly divided Court, 345 U.S. 979, for a different construction of the time provision, is obviously misplaced. The issue was subsequently clarified in the *Grainger* opinion which pointed out that the *Klinger* case involved an additional issue (i.e. "whether the offense charged was one involving fraud of a pecuniary nature upon the United States"). 346 U.S. at p. 247. See also the dissenting opinion in the *Grainger* case in which three justices of this Court would have affirmed the dismissal of the indictments "adopting the reasoning in the opinion of Judge Learned Hand in *United States* v. *Klinger* * * *." Thus the affirmance by divided vote of this Court in *Klinger* has no significance in relation to the time problem. ~~sole provision, was the only criminal prohibition in that statute.~~

[3] The recent decisions by this Court with respect to whether the fraud involved must be of a pecuniary nature and an element of the offense all arose under the first clause. *Bridges* v. *United States*, 346 U.S. 209, 221-224; *United States* v. *Grainger, supra* (346 U.S. at p. 242).

"committed in connection with" the disposition of government property; they would read clause two to restrict its operation to crimes having such a condition in their statutory definition. They attempt, in other words, to analogize clause two to clause one despite the obvious difference in language and purpose. This interpretation is negated, not only by the language of the statute discussed above, but by its legislative history.

The war fraud suspension provision, which is now included as the first clause of the Wartime Suspension of Limitations Act, was first promulgated in the Act of August 24, 1942, c. 555, 56 Stat. 747, at the beginning of World War II. It was limited in operation to those crimes which involved fraud as a necessary ingredient in their proof. Later, toward the end of the war, when Congress had under consideration the disposition of surplus property and the termination of war contracts, the suspension act was amended by two statutes to provide two additional categories of offenses to be saved for prosecution. Section 19(b) of the Contract Settlement Act of July 1, 1944 (c. 358, 58 Stat. 649, 667), in amending the Suspension Act, provided for the suspension of crimes "committed in connection with" war contracts, and Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U. S. C. (1946 ed.) 590a), the precursor of the present clause two, provided for the suspension of limitations as to crimes "(3) committed in connection with the care and handling and disposal of property under the Sur-

plus Property Act of 1944 * * *." Obviously as to the latter two categories of crimes, the controlling factor was not the wording of the statute under which the crime was being prosecuted, but whether in its factual substance the crime was one committed during the war and was directed at the contractual interests of the United States or was committed in connection with the disposal of surplus property.[4] This is made apparent by the fact that neither the Contract Settlement Act nor the Surplus Property Act of 1944 provided penal provisions for their enforcement, but depended upon the general prohibitions of the Criminal Code for protection of the governmental functions under those statutes.[5] If what petitioner refers to as the "essential ingredient rule" were applied to these two 1944 amendments, they would be rendered completely meaningless, as no criminal provision anywhere in the Code referred in specific terms to "the Surplus Property Act of 1944."[6]

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[4] The Report of the Senate Committee on Military Affairs states (S. Rep. 1057, 78th Cong., 2d sess., p. 14): "As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offenses against the laws of the United States *arising in connection with activities under this act* was suspended until 3 years after termination of hostilities in the present war." [Italics supplied.]

[5] Section 27 of the Surplus Property Act, a conflict of interests provision, was the only criminal remedy provided for.

[6] Section 19 of the Contract Settlement Act of 1944 illustrates this point. It contains the following subsection:

> "(d) The provisions of section 35-A of the Criminal Code (18 U.S.C., sec. 80) shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused

When the Criminal Code was revised in 1948, and the Suspension Act was rewritten to make it permanent legislation, the provision for suspending offenses "committed in connection with the * * * disposal of property under the Surplus Property Act of 1944," was replaced by clause two of 18 U. S. C. 3287 which applies in pertinent part to offenses "committed in connection with the * * * disposition of any * * * personal property of the United States." Here, as under the previous language relating specifically to the Surplus Property Act of 1944, it is apparent that it is the subject-matter of the crime—the underlying facts—which determine whether it comes within the suspension, rather than some express statutory ingredient of the penal provision which is invoked. In short, the failure of the indictment to charge a crime containing in its definition some specific reference to the disposition of government property is not controlling. What is important is that each count of this indictment charges an "offense * * * (2) committed in connection with the * * * disposition of * * * personal property of the United States."

There is no conflict of opinions on this issue. The only reported district court opinion is in accord. *United States* v. *Epstein*, 119 F. Supp. 946 (E. D. Pa.). The question is obviously of diminished importance in view of the time elements involved.

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to be made or used for any purpose under this Act or under any regulations pursuant to this Act."

Counts 2-7 of the instant indictment were founded on this section of the Code.

2. Petitioners contend (Pet. 17-18) that all of the counts of the indictment are void since they charge that the false statements were in matters within the jurisdiction of the War Assets Administration when, in fact, petitioners assert, they were within the jurisdiction of the War Assets Administrator. However, as the court below observes, the responsibility for the disposal of surplus property was placed in one agency, the War Assets Administration, headed by a War Assets Administrator. No division of jurisdiction existed between them. *Todorow* v. *United States,* 173 F. 2d 439, 444-445 (C. A. 9), certiorari denied, 337 U. S. 925. See Brief for the United States in Opposition in that case, No. 727, O. T. 1948, pp. 8-10.

Petitioners also attack counts 2-7 of the indictment for defects in pleading. The charge was that petitioners caused to be made and used a false certificate "* * * which said false certificate and accompanying and attached Veteran's Application For Surplus Property Form SWPC-66 were of the tenor and description following, to-wit:". Then follows a photostatic copy of the certificate together with two pages of the accompanying application. Petitioners contend (Pet. 15-16) that some of the copies of the certificates set forth in the indictment do not indicate a signature at the bottom, although concededly the evidence shows that the original of each was signed (Pet. 28). Modern rules of pleading, however, do not require that evidentiary facts be pleaded in detail or with hair splitting precision. It suffices that the indictment contain "a plain,

concise and definite written statement of the essential facts constituting the offense charged" (Rule 7(c), F. R. Crim. P.), as this indictment did. The various counts apprised petitioners "of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense." *United States* v. *Debrow,* 346 U. S. 374, 378.

3. Petitioners also attack various aspects of the charge. Despite the absence of objection at the trial, they assert (Pet. 18) that they were prejudiced by the fact that the court charged that one who aids, abets, counsels, commands or induces or procures the commission of an offense is a principal (R. 707-708). However, one defense raised on the trial by each of the petitioners was that he was in the position of an "intermediary" in the various transactions; throughout the trial, each petitioner attempted to disassociate himself from the use of veteran's certificates and to impute to government witness Leifer sole responsibility for such use. Under the circumstances, the aider and abettor instruction was clearly germane. It told the jury that despite the fact that petitioners might not have been the prime movers in every phase of each of the transactions comprehended in counts 2 to 7, either could be found guilty as a principal if he aided its commission. *Pereira* v. *United States,* 347 U. S. 1, 10-11.

Petitioners also assert error (Pet. 19-20) in the refusal of the trial court to give a requested in-

struction relative to their knowledge of "what representations were made by the veterans at the time their applications were filed, and that the [petitioners] knew those statements to be false" (R. 671). No such knowledge of the precise statements and entries in the applications at the time they were filed by the veterans is required to prove the crimes charged. *Todorow* v. *United States,* 173 F. 2d 439, 447 (C. A. 9), certiorari denied, 337 U. S. 925. As the very cases cited by petitioners (Pet. 19) establish, it was enough that the jury be required to find that petitioners intended that some false representations be made. In submitting the case to the jury, the court charged, *inter alia,* that they must find beyond a reasonable doubt that "the defendants knowingly and willfully caused to be made or used a false certificate, knowing the same to contain a fraudulent and fictitious statement or entry in a matter within the jurisdiction of a department or agency of the United States * * *" (R. 712).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1955.

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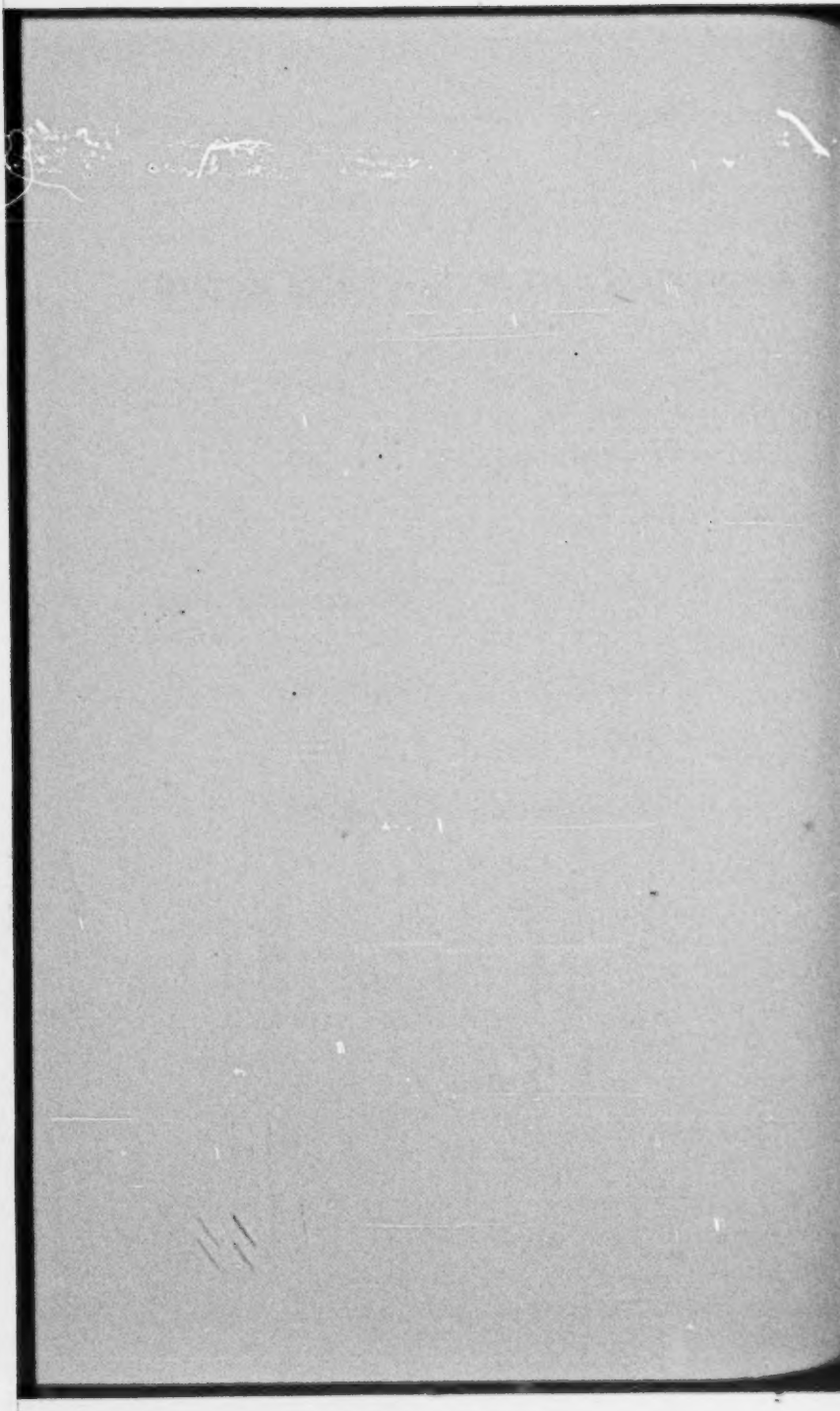
PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 204

HAROLD LURIE AND SAMUEL DWORETT, *Petitioners*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of October 10, 1955, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed July 5, 1955, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The court below has misapplied the plain language and intent of the Wartime Suspension of Limitations Act in such a manner as to make necessary this Court's

review of the case. Such review is peculiarly appropriate in view of the clear conflict between the reasoning of the Court of Appeals and that of this Court in prior decisions. Indeed, the Court of Appeals clearly invited such review by frankly stating that "the probable holding of the Supreme Court on the question before us is ... obscured" by conflicting rulings, 222 F. 2d at 14, and that its "task in resolving this issue is made difficult" by previous decisions of this Court, 222 F. 2d at 13.

The offense charged against petitioners took place in 1946 and under the normal statute of limitations the indictment against them would have been barred after 1949.

The petitioners' indictment on December 30, 1952, more than six and one half years after the offense, was held below, however, to be timely under the second clause of the Wartime Suspension of Limitations Act,* which suspended, until three years after the

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* The Suspension Act, 18 U.S.C. 3287, provides:

"When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress. * * *"

suspension of hostilities, the running of the statute of limitations as to offenses "committed in connection with the . . . disposition of any real or personal property of the United States."

It is the petitioners' claim that the Act, on its face and as a matter of statutory history and construction, demonstrates that the second clause thereof is merely a particularization of the first clause and that it is therefore necessary, if the Suspension Act is to apply, to show that the offense involved fraud against the United States. The Court of Appeals explicitly found that the statutory crime charged to petitioners involved no fraud against the United States, 222 F. 2d at 15, but nevertheless found the Suspension Act applicable. This precise question has not previously been decided by this Court. And since the decision below is so clearly contrary to the language of the Act and the congressional purpose in adopting the Act, as found by this Court, review by certiorari becomes appropriate.

Under the reasoning of the court below, it makes no difference whether or not the offense involves fraud against the United States; all offenses, whether fraudulent or not, are suspended if they arose "in connection with" the disposition of property of the United States. Such a literal and parochial reading of the second clause of the Act, without regard to its context in the Act as a whole, does gross violence to the basic principles of statutory construction and ignores the pertinent criteria heretofore established by this Court with respect to the interpretation of this particular Act. It is axiomatic, of course, that statutes are to be construed in their entire context, *United States* v. *Alpers*, 338 U. S. 680, 684, and that a court "must look

to the whole of the section, in order not to give undue effect to particular words or clauses," *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345. These elementary principles, which are especially relevant in a criminal proceeding, are among the steps necessary to a correct understanding of the legislative will.

In this case, the legislative will is not to be found by a bare reading of the second clause of the Act. That clause must be read in its context and in light of the basic purpose of the legislation. As this Court pointed out in *Bridges* v. *United States*, 346 U. S. 209, 217-219, this statute had its origins in prior legislation directed at wartime frauds against the United States. The concern which led Congress to adopt the Wartime Suspension of Limitations Act and its predecessor statutes was "the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program" and its desire "to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution." 346 U. S. at 218.

There is nothing to indicate that in adopting Section 28 of the Surplus Property Act of 1944, 58 Stat. 765, 781, the precursor of the present clause two of the Wartime Suspension of Limitations Act, Congress had in mind any crime in connection with the disposition of federal property other than those involving fraud or attempted fraud against the United States. Indeed, the intent to limit clause two only to crimes involving fraud is clearly evident from the Reviser's Note appended to the 1948 recodification of the Act, where it is said (18 U.S.C.A. 3287, Reviser's Note):

> The revised section [2] extends its provisions to all offenses involving the disposition of any

> property, real or personal, of the United States. *This extension is more apparent than real since phrase (2), added as the result of said Act [Surplus Property Act of 1944], was merely a more specific statement of offenses embraced in phrase (1) of this section.* [Emphasis supplied.]

Hence in speaking of offenses committed "in connection with" the disposition of federal property, the Congress was merely making "a more specific statement of offenses embraced" in clause one—which are expressly limited by such clause to those crimes that involve fraud. The statutory scheme thus becomes clear to the effect that clauses two and three are but more definite delineations of the types of offenses involving fraud against the United States as to which limitations are to be suspended.

Viewed against this statutory background and scheme, this Court's statement in *Bridges* v. *United* States, 346 U. S. 209, 216, becomes highly relevant in indicating that the purpose of the Act here involved was "to suspend the general statute of limitations only as to war *frauds* of a pecuniary nature or of a nature concerning property." And the further statement of this Court in the *Bridges* case, 346 U. S. at 221, that "the wartime suspension of limitations authorized by Congress is limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged*" makes plain the egregious error committed by the court below.

The Court of Appeals has conceded that fraud is not involved in the crimes charged to the petitioners. Yet it is clear from the above discussion that the crime must involve fraud in order to suspend the statute of

limitations. And it is "the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act," *Bridges* v. *United States*, 346 U. S. 209, 223. Petitioners here were found guilty of making false statements in violation of 18 U.S.C. (1946 ed.) 80, a crime which was complete upon the making of such statements. The statutory definition of such crime does *not* include, as the *Bridges* case requires, fraud as an essential ingredient. The inapplicability of the Suspension Act is therefore clear beyond dispute.

The Court of Appeals has thus rendered an opinion in direct conflict with this Court's holding in the *Bridges* case. Review of that decision by this Court becomes essential in order to maintain the congressional purpose and to prevent a miscarriage of justice. The suggestion of the Solicitor General (p. 10 of brief in response to petition) that the issue is "obviously of diminished importance in view of the time elements involved" is certainly irrelevant. The "time elements involved" have no bearing on the conflict with the intent of Congress and this Court's opinion in the *Bridges* case. The petitioners face a five year prison sentence and a heavy fine. The injustice to them arising out of the erroneous reading of the Suspension Act by the Court of Appeals is in no way lessened because there may be a decreasing number of such cases brought by the Government. The supervisory and appellate jurisdiction of this Court should not be made to turn on the likelihood of future cases arising in which the same substantial error of law may appear. The error committed in this case by the Court of Appeals is alone enough to justify full review by this Court on writ of certiorari.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

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EUGENE GRESSMAN.

October 28, 1955.